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Labor Law - Arbitration - Right of Employer of Discharge Employer Who Refuses to Testify Concerning His Communist Affiliation

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LABOR LAW—ARBITRATION—RIGHT OF EMPLOYER TO DISCHARGE EMPLOYEE WHO REFUSES TO TESTIFY CONCERNING HIS COMMUNIST AFFILIATION—A member of the United Electrical Workers Union was discharged from the J. H. Day Company because of his refusal to testify concerning his communist affiliation before the Ohio Un-American Activities Committee and because of the unfavorable publicity which had resulted. Under grievance procedure, the union brought the matter before arbitration. *Findings*, there was no just cause for dismissal. The employee is entitled to back pay and to reinstatement subject to security clearance. *J. H. Day Company*, 22 LAB. ARB. REP. 751 (1954).

The prevalent view of arbitrators is that communist affiliation, even if it is assumed from invocation of the Fifth Amendment, does not of itself constitute just cause for dismissal under an employment contract.[1] The rationale of this result is that, absent other factors injurious to the company, an alleged communist who performs his job according to the requisite standards is entitled to the same treatment as other employees.[2] This general rule is, however, subject to three exceptions: (1) ". . . where the Company has a specific directive from the Federal Government . . . to exclude persons it [the Government] suspects of Communism from part or all of its premises,"[3] (2) where there is "evidence of disruptive activity in the plant or reaction by fellow employees which . . . dis-

[1] Spokane-Idaho Mining Co., 9 Lab. Arb. Rep. 749 (1947). The employee admitted membership in the Communist Party. In ordering reinstatement, the arbitrator observed that the federal loyalty program was predicated upon a relationship of public trust and confidence involved in government work. He further noted, at 752, "Our government apparently still realizes *that labor or the right to labor is a valuable property right.*" Cutter Laboratories, 15 Lab. Arb. Rep. 431 (1950), affd. Cal. Super. Ct., 16 Lab. Arb. Rep. 208 (1951), reaffirmed Cal. Dist. Ct. of App., 1st Dist., 22 Lab. Arb. Rep. 4 (1954). Dismissal on grounds of communist affiliation was held not to be just cause. The employer appealed, contending that the contract was illegal as it is against public policy to force a company to employ a communist. The courts declared that absent congressional action declaring communist affiliation criminal, the public policy urged was too vague to be enforceable.

[2] Foote Bros. Gear & Machine Corp., 13 Lab. Arb. Rep. 848 (1949), deciding that subversive activities were not material. The employee's present conduct only was at issue. It is assumed that substantial violation of company rules will warrant dismissal.

[3] Consolidated Western Steel Corp., 13 Lab. Arb. Rep. 721 at 726 (1949). Just cause for dismissal found here on other grounds. However, refusal to testify about the loyalty of others before a grand jury, evidence as to communist affiliation, and averred ideological support of Russia held not just cause.

rupts production,"[4] (3) where the "prosecution for Communism or the Communist activities of an employee, are actually damaging the reputation of a Company with specific, harmful effects upon its business."[5] The first exception, a specific government directive, is generally found to apply where the company is working on government contracts which involve the handling of classified material. In this situation, the federal government conducts security checks which may result in denying certain employees access to the classified materials. The question whether denial of such clearance warrants discharge has been answered in the negative where it is feasible to separate the employee from the classified materials. Where this is not practical, arbitrators have decided that dismissal is valid.[6] However, this does not mean that a company may make its own determination of the employee's loyalty merely because it may be doing government work.[7] Under the second exception, where internal disruption is caused by the continued presence in the plant of one having alleged communist affiliations, dismissal has been allowed. Significant disturbance must usually be shown, however.[8] The proposition that a company has the right to protect its good name and reputation is the basis of the third exception to the rule that communist affiliation is not grounds for dismissal. This was argued in the principal case since the employee had not only testified before a governmental committee, but had been cited and convicted for contempt thereof. His name had appeared in the newspapers on several occasions; only once, however, was he directly connected with the Day Company by the press. The company contended that the publicity was damaging to its reputation. Absence of proof of specific financial loss led the arbitrator to reject this argument. Other arbitrators have not been as stringent in their insistence upon showing actual damages. It seems to be well recognized that businesses which are peculiarly susceptible to public criticism and dependent upon public approval may dismiss in such cases without proof of specific injury to reputation. Notable in this category are newspapers or publishers.[9] Possible injury to business reputation, without proof

[4] Principal case at 755; Chrysler Corp., 18 Lab. Arb. Rep. 836 (1952); Chrysler Corp., 19 Lab. Arb. Rep. 408 (1952).

[5] Consolidated Western Steel Corp., note 3 supra, at 726.

[6] Bell Aircraft Corp., 16 Lab. Arb. Rep. 234 (1951); Liquid Carbonic Corp., 22 Lab. Arb. Rep. 709 (1954). Arbitrators reason that the company must follow the defense requirements. If this necessarily involves dismissal, then the employment contract is superseded.

[7] Arma Corp., 22 Lab. Arb. Rep. 325 (1954).

[8] Chrysler Corp. cases, note 5 supra (evidence held not sufficient to warrant dismissal); Jackson Industries, Inc., 9 Lab. Arb. Rep. 753 (1948) (dismissal warranted where the other employees threatened to walk out, petitioned for his discharge, and further petitioned for not reinstating him). But note, Firestone & Rubber Workers, 4 Am. Lab. Arb. Awards ¶68,778 (1951), where discharge of a communist sympathizer was upheld on grounds of unrest, lowered morale and lowered efficiency. The finding was based on but one incident where the employee almost provoked a fist-fight over his pro-Russian opinions.

[9] Los Angeles Daily News, 19 Lab. Arb. Rep. 39 (1952) (refusal of two editorial writers to deny charges of membership in the Communist Party); Publishers Association of New York City, 19 Lab. Arb. Rep. 40 (1952) (discharge of linotypist, who admitted past Communist affiliation, for substitution of "fascism" for "freedom"); United Press Associa-

of specific damages, has also been held grounds for dismissal in a company which handled many government contracts involving classified material. The employee in *Burt Manufacturing Company*[10] had run for office on the Communist Party ticket and recently refused to testify before an Un-American Activities Committee as to his affiliations. Dismissal was upheld on grounds that this could damage the company in its efforts to secure government contracts. In the principal case, the Day Company was also trying to secure government contracts but was unable to show loss of any particular contract due to unfavorable publicity. Some relaxation of this requirement might be in order, since damages in this area will be hard to prove almost invariably. Since judicial review of an arbitrator's decision is possible only in rare circumstances,[11] the significance of the accumulated findings does not lie in the differences of opinion which may have arisen in dealing with this problem, but in the striking similarity of approach to the question. Of real significance is the fact that it is possible to formulate general rules in this area of arbitration.

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tion, 22 Lab. Arb. Rep. 679 (1954) (invocation of Fifth Amendment would have been just cause if properly raised under grievance procedure).

[10] 21 Lab. Arb. Rep. 532 (1953).

[11] Cutter Laboratories, note 1 supra. Both courts declared they would not review matters decided in arbitration absent fraud, misconduct of the arbitrator, or want of arbitration jurisdiction.